Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1978
No. 78-296

LUCIO P. SALVUCCI
Pro Se — Petitioner

versus

REVERE RACING ASSN. INC.
et al — Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

LUCIO P. SALVUCCI
746 Commercial Street
Weymouth, MA 02189

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SUPREME COURT OF THE UNITED STATES

October Term, 1978
No. _____

LUCIO P. SALVUCCI *Petitioner*
Pro Se

versus

REVERE RACING ASSN., INC. *Respondent*
et al

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Petitioner, Lucio P. Salvucci, respectfully prays that a writ of certiorari issue to review the Memorandum and Order of the United States Court of Appeals for the First Circuit, on a re-hearing in this case, entered June 6, 1978 from the first hearing of May 5, 1978.

OPINIONS BELOW

The opinions of the Court of Appeals has been officially or unofficially reported and is appended hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on May 5, 1978. A petition for rehearing was granted, denied, and entered on June 6, 1978. This court has jurisdiction under 28 USC §1254 (1).

QUESTIONS PRESENTED

(1) Whether the decision of the United States Court of Appeals for the First Circuit must be set aside under §47 (Judges Statutory Disqualifications) and assigned to a Court of Appeals panel whose members are all qualified to hear and determine the appeal.

(2) Whether the visible expression of the Petitioner's copyright is valid with entitlement under the Law, Title 17 USC (§4).

CONSTITUTIONAL PROVISIONS

1. Title 28 USC
   §47 (Judges Statutory Disqualification).

2. Title 17 USC
   §4 All the writings of an Author are copyrightable.
   §101 Liability for infringement.

STATEMENT OF THE CASE

This cause came on to be heard on the motion of Respondent-Appellee, Revere Racing Association, Inc. et al to dismiss on November 1, 1977 in the District Court of Massachusetts before Judge Murray on copyright infringement which dismissal was granted on November 22, 1977. (A. pg. 4). From this Memorandum and Order the Petitioner – Plaintiff, pro se appealed to the First Circuit Court of Appeals.

The Appealed case was tried without oral argument before Coffin (Chief Judge), Campbell and Bownes Circuit Judges. Case No. 78-1012. The decision of the District Court for the District of Massachusetts was upheld Per Curiam by the Circuit Court on May 5, 1978. (A. pg. 1-2) Petitioner petitioned for a re-hearing which was granted and decided without oral argument before Coffin (Chief Judge), Campbell and Bownes, Circuit Judges, and was denied and entered on June 6, 1978. (A. pg. 3).

REASONS FOR GRANTING OF THE WRIT

I. This cause of copyright infringement being petitioned for a Writ of Certiorari under the Act of March 3, 1891 Chapter 517 §6, to review a decree made by Judge Hugh H. Bownes in the Circuit Court of Appeals for the First Circuit from a judgment of the District Court of New Hampshire from which Judge Bownes was District Judge . . . The leading question is whether Judge Bownes

was disqualified to sit at the hearing of that Appeal by the provision of §3 of that Act – "that no justice or judge before a cause or question may have been tried or heard in a District Court or existing Circuit Court shall sit on the trial or hearing of such cause or question in the Circuit Court Appeals." 26 Statute at L. 827.

If Judge Bownes was so disqualified, the decree in which he took part, even if not absolutely void, must certainly be set aside and quashed, without regard to its merits. American Construction Co., v. Jacksonville, T. & K.W. Railway Co., 148 U.S. 372, 387 (37:486, 492).

Circuit Court Judge Bownes of the First Circuit Court of Appeal first heard the same or similar cause when he was a District Court Judge in New Hampshire. Salvucci v. New Hampshire Jockey Club, Inc., et al Civil Action No. 75-223. (A. pg. 5). Judge Bownes as a Circuit Court Judge for the First Circuit Court of Appeals also heard by the same Petitioner-Appellant in the Court of Appeals the same or similar cause with only different strangers. Salvucci v. Revere Racing Assn. Inc., et al Case No. 78-1012. (A. pg. 1-2).

JUDGES-STATUTORY DISQUALIFICATION

13 ALR Fed. 855 §8 Pg. 870 §8 Effect of Judges being held disqualified after having participated in Appellate decision.

It has been held that where a Judge is subject to disqualification under §47 of Title 28 or similar predecessor statutes, but where the judge nevertheless participates in the Court of Appeals decision and the Court of Appeals' judgment is rendered before the Judge is held disqualified, the Court of

Appeals' judgment must be set aside, and the Appeal must be assigned to a Court of Appeals panel whose members are all qualified to hear and determine the Appeal.

In Moran v. Dillingham (1899) 174 U.S. 153, 43 L. Ed. 930, 19 S. Ct. 620, it was held that where a Judge on a Court of Appeals was statutorily disqualified because of his participation in the lower court proceedings, the Appellate decree in which he took part, even if not absolutely void, had to be set aside and quashed without regard to its merits, and the case had to be remanded to the Court of Appeals for a hearing and determination according to Law by a bench of competent Judges.

The necessary conclusion is that Judge Bownes was incompetent to sit on the Appeal in question, and the decree in which he participated was not made by a Court constituted as required by Law. Therefore, this Court should set aside and quash the Circuit Court of Appeals decree.

II. Copyright does not preclude others from using the ideas or information revealed by the Author's work. It pertains to the literary, musical, graphic, or artistic form in which the Author expressed intellectual concepts. Under § 202.1 of Title 17 USCA with the heading "Material not subject to copyright" – Ideas, plans, methods, systems, or devices – as distinguished from the particular manner in which they are expressed or described in a writing. The first part – ideas, plans, methods, systems, or devices are not capable of copyright and are as free as the air we breath not precluding others from using; However, the second part of the above statement "as distinguished from the particular manner in which they are expressed or described in a writing" – means that – ownership is present by the Author in the visible expression or description he achieves.

Of the Petitioner's copyrighted work (A. pg. 6) the following analysis is present:

> An idea unrealized v. the visible expression of an idea as a completed reality.

Following is a classic example of (a) an idea not capable of copyright and (b) the visible expression of an idea which is capable of copyright and (c) Petitioner's copyrighted writing.

In Merriman-Websters Dictionary Co. Supplement 6000 Words (1976 Edition, Pg. 205) the word Tri-fec-ta is found and gives as its definition – A variation of the Perfecta in which a bettor must select the first 3 finishes of a race in the correct order of finish in order to win. This definition in and of itself is not capable of copyright as it is just an idea with ingredients for something of imagination to be done – and the Petitioner has done just that. His idea was to select the 3 positions of a race to finish in exact order on one ticket of a single race.

Following is the complete copyrighted work of imagination the Petitioner has given to his unknown, invisible idea. (c)

> TRI-3 is a 3 finish position play or wager on horses or dogs.
>
> The object is to select correctly all finish positions starting with your first chosen finish position of your TRI-3 ticket.
>
> If no one selects correctly all three finish positions, then the person(s) getting the most consecutive correct finish positions starting with their first chosen finish position of their TRI-3 ticket is the winner.

Presently the Trifecta which is being used by the Respondant as a new product in their racing establishment for the purpose of competing (by betting through pari-mutuel machines) as an idea in (a) above could not be done. The Petitioner's copyrighted work (c) has a "built in safety valve" which allows a contestant (pari-mutuel bettor) the opportunity to participate in the rewards as a winner of the mutuel pool involved – without having the first 3 finishes of a race in the correct order of finish in order to win. The Petitioner's copyrighted work also allows a contestant (pari-mutuel bettor) to participate in the distribution of the pool involved with less than the correct 3 positions, namely – failure to select the exact 3 positions correctly the person having the exact first and second position correctly is the winner, and failing to have the exact first and second position correctly the person having the first or win position to win will be the winner.

In Burrow-Giles Lithographic Co. v. Sarony (1883) 111 US 53, 58, 28 L. Ed. 349, 4 S. Ct. 279 the Supreme Court was to say Any work by which the "ideas in the mind of the Author are given visible expression" is a proper subject of copyright.

The Petitioner's work is fixed in a tangible medium of visual expression from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device, and can be used for more than a transitory period of time. The original work of authorship the Petitioner gives to his writing has more imagination than a dictionary and the like – even though it is just a single sheet.

By applying the Supreme Court statement in Burrow-Giles to the Petitioner's copyrighted work, the copyright – without a doubt – would be valid and not invalid as the U.S. Circuit Court of Appeals for the First Circuit and U.S. District Court of Massachusetts have decreed in this case.

Under binding Supreme Court and Circuit Court interpretation of the Copyright Law Title 17, USC the visible expression an Author gives to his writing certainly falls within the scope of the law and its protection.

CONCLUSION

Due to the erroneous result reached – because of the wrong direction of law the lower courts applied to Title 17 USC in the Petitioner's copyrighted work, and the reasons set forth above, it is respectfully submitted that the petition for Writ of Certiorari be granted.

Respectfully submitted,

Lucio P. Salvucci

746 Commercial Street
Weymouth, MA 02189

LUCIO P. SALVUCCI

CERTIFICATE OF SERVICE

I, Lucio P. Salvucci, pro se, Petitioner, hereby acknowledge that on August 10, 1978, I mailed 3 copies of the herein enclosed Writ of Certiorari to the United States Supreme Court through the U.S. Postal Service, postage prepaid to the following:

Walter J. Hurley, Attorney for Respondent
22 Beacon Street
Boston, Massachusetts

Friedman & Atherton, Attorney for Respondent
28 State Street
Boston, Massachusetts 02109

Dated August 10, 1978.

Lucio P. Salvucci
LUCIO P. SALVUCCI

APPENDIX

Tri-3

Tri-3 is a 3 finish position play or wager on horses or dogs.

The object is to select correctly all finish positions starting with your first chosen finish position of your Tri-3 ticket.

If no one selects correctly all three finish positions, then the person(s) getting the most consecutive correct finish positions starting with their first chosen finish position of their Tri-3 ticket is the winner.

Copyright, LUCIO P. SALVUCCI 1962

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-1012.

LUCIO P. SALVUCCI,
Plaintiff, Appellant,

v.

REVERE RACING ASSOCIATION, INC., ET AL.,
Defendants, Appellees.

JUDGMENT

Entered May 5, 1978

This cause was submitted on briefs on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is affirmed.

By the Court:

/s/ Dana H. Gallup
Clerk.

UNPUBLISHED OPINION

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-1012

LUCIO P. SALVUCCI
Plaintiff, Appellant,

v.

REVERE RACING ASSOCIATION INC., ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Frank J. Murray, U. S. District Judge]

Before
COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

May 5, 1978

Per Curiam. Salvucci appeals from the dismissal of his copyright infringement suit. As he concedes, a previous suit brought by him raised an identical claim against different defendants and was dismissed on its merits by the District Court for the District of New Hampshire. We affirmed that decision in an unpublished opinion. *Salvucci* v. *New Hampshire Jockey Club, Inc.*, No. 75-1434 (1st Cir. Mar. 1, 1976), *cert. denied*, 429 U.S. 860 (1976). As our earlier decision controls this case, we affirm the dismissal of this suit.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-1012

LUCIO P. SALVUCCI
Plaintiff, Appellant,

v.

REVERE RACING ASSOCIATION INC., ET AL.,
Defendants, Appellees.

Before
COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

MEMORANDUM AND ORDER

Entered: June 6, 1978

A belief that citation of relevant authority was unnecessary is not a sufficient explanation under Rule 15 as to why the matter was not previously presented to court, and the petition for rehearing may be denied on that ground alone. In any event, the authority cited by petitioner is not relevant. Whatever the scope of protection afforded by Argentine's copyright laws, and whatever force these laws might have in the United States in other contexts, petitioner's claim derives solely from the copyright law of the United States. Under binding Supreme Court and circuit court interpretation of this law, the ideas contained in petitioner's betting system fall outside the scope of protection.

The petition for rehearing is denied.

By the Court,
/s/ Dana H. Gallup
Clerk.

[cc: Mr. Salvucci and Mr. Hurley.]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LUCIO P. SALVUCCI,
Plaintiff

v.

REVERE RACING ASSOCIATION, INC., ET AL,
Defendants

CIVIL ACTION
NO. 75-3174-M

MEMORANDUM AND ORDER

MURRAY, Senior District Judge

This cause came on to be heard on the motion of defendant Revere Racing Association, Inc., to dismiss. The case was considered on the oral argument of the parties and on the papers on file in the case.

Plaintiff and defendant agree that the material facts in this case are identical to those in *Salvucci* v. *New Hampshire Jockey Club, Inc., et al,* No. 75-224 (D.N.H.). On October 6, 1975, Judge Bownes dismissed that case for failure to state a cause of action. The First Circuit affirmed per curiam, No. 75-1434, on March 1, 1976. This court is bound to follow the law as the First Circuit states it.

While the three other defendants have not moved to dismiss, the court may act as to them *sua sponte.* The usual rule is that notice to plaintiff is required before such action, *Literature, Inc.* v. *Quinn,* 482 F. 2d 372 (1st Cir. 1973), but the purpose of this rule is to allow plaintiff an opportunity to argue against dismissal, *id.* at 374: *Gomez Vazuqez* v. *Litton Industries Leasing Corp.,* 67 F.R.D. 117, 120 (D.P.R. 1975). Plaintiff has had a hearing on Revere Racing Association's motion, and the issues as to the other defendants are exactly the same.

Accordingly, the motion to dismiss is GRANTED and the complaint is dismissed as to all defendants.

November 22, 1977

UNITED STATES SENIOR DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Lucio P. Salvucci	)	
	)	
v.	)	Civil Action
	)	No. 75-223
New Hampshire Jockey	)	
Club, Inc., et al	)	

ORDER

1. Both cases are dismissed as to Timothy Connors. The plaintiffs have sued "as he is Chairman of the New Hampshire Racing Commission." Since the action against Mr. Connors is really an action against the State of New Hampshire, the complaints are dismissed on the ground of sovereign immunity.

2. Both cases are dismissed for failure to state a cause of action. The basis of both complaints is that the plaintiffs have originated a wholly creative work protected by the copyright law which the defendants have appropriated. The work is a system of betting on horse races. It has long been established that ideas cannot be protected by a copyright. See, Briggs v. New Hampshire Trotting and Breeding Association, Inc., 191 F. Supp. 234 (D. N.H. 1960) and the cases cited therein. The only way to protect an original creative idea is by a patent. It is obvious that the plaintiffs' betting systems are not patentable.

I appreciate the difficulty a layman will have in understanding this opinion, but the law is crystal clear. It is my opinion that it is futile for the plaintiffs to pursue this matter further.

SO ORDERED.

October 6, 1975

/s/ Hugh H. Bownes
United States District Judge

cc. Andrew Dunn, Esq.
Stephen T. Keefe, Jr., Esq.
John Ahlgren, Esq.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-296

LUCIO P. SALVUCCI,
PETITIONER,

v.

REVERE RACING ASSN., INC. ET AL,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONSE FOR RESPONDENT REVERE RACING ASSN., INC.

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In the
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-296

LUCIO P. SALVUCCI,
PETITIONER,

v.

REVERE RACING ASSN., INC. ET AL.,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONSE FOR RESPONDENT REVERE RACING ASSN., INC.

Statement of the Issue

Whether the Court of Appeals for the First Circuit properly affirmed a dismissal by the District Court when an identical action in the District of New Hampshire, as admitted and alleged by the Plaintiff, had been dismissed on motion, an appeal was taken to the First Circuit which affirmed the dismissal, and Certiorari was denied.

Statement of Facts

The plaintiff holds a Certificate of Registration from the Register of Copyrights (R. App. p. 2) which he alleges was infringed by the defendants (R. App. 2). A similar suit was filed by the plaintiff against a different race track operator in the United States District Court for New Hampshire (A. App. p. 8) in which the issues were identical with the present action (R. App. p. 8). In the New Hampshire (R. App. p. 8) in which the issues were the defendants was allowed. (R. App. p. 8). The plaintiff appealed to the Court of Appeals for the First Circuit which affirmed per curiam (R. App. p. 8). (*Salvucci* v. *N.H. Jockey Club, Inc.*, No. 75-1434, Mar. 1, 1976. 530 F.2d 962, Certiorari denied, 429 U.S. 860).

A motion to dismiss by the present Respondent was allowed in the District Court for the District of Massachusetts (R. App. p. 9) and the plaintiff appealed (R. App. p. 27). Judgment was affirmed by the Court of Appeals, No. 78-1012, May, 1978.

Arguments and Authorities

It is axiomatic that when issues are litigated and resolved by final appellate review, the same identical issues raised by the same plaintiff in identical pleadings against a different defendant are controlled by the prior judicial resolution under the principles of collateral estoppel.

Respectfully submitted,

Revere Racing Assn., Inc.
By: Joyce, Capeless, Kilroy,
McNulty & Roddy
Walter J. Hurley, Esquire,
Attorneys for Respondent